



NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive • McLean, Virginia 22102
703/821-7040 • 703/821-7041

Legal & Regulatory Group

June 27, 2005

Via E-Mail

Federal Trade Commission
Office of the Secretary
Room H-159
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Sir/Madam:

The National Automobile Dealers Association (“NADA”) submits the following comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Notice of Proposed Rulemaking (“NPR”) requesting comment on its proposed rules pursuant to several distinct provisions of the CAN-SPAM Act. 70 Fed. Reg. 25,426-25,455 (May 12, 2005).

NADA represents approximately 20,000 franchised automobile and truck dealers who sell new and used vehicles and engage in service, repair and parts sales. Our members employ more than 1.3 million people nationwide. A significant number of our members are small businesses as defined by the Small Business Administration. Accordingly, NADA is particularly focused on regulatory changes that may increase the regulatory burden for small businesses.

1. Section 316.2 - (d)

The Commission seeks comment on whether it should adopt a “safe harbor” with respect to opt-out and other obligations for companies whose products or services are advertised by affiliates or third parties. Although the Commission “believes it inappropriate to excuse content providers in advance from the obligation to monitor the activities of third parties with whom they contract,”¹ a limited “safe harbor” should be adopted since companies are not always able to control what affiliates and third parties are sending out. Companies that practice due diligence when selecting third parties to advertise via e-mail and maintain reasonable practices and procedures to prevent violations of CAN-SPAM, should be allowed some protection. Similarly, senders that have made a good faith effort to honor opt-out requests should be given an opportunity to remedy a consumer complaint before any enforcement action is taken against them.

2. Section 316.2(o) - (b)

The Commission also asks whether debt collection e-mails should be considered “commercial.” The CAN-SPAM Act defines a commercial e-mail as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.”² A debt collection email alone would not fall under this definition since it does not involve the promotion or advertisement of a product or service. Rather, it is based on a transactional relationship between the sender (or third party agent of sender) and the recipient. In addition, debt collection calls are not considered telemarketing. Under the FTC’s Telemarketing Sales Rule, “debt collection and market research activities are not covered...because they are not “telemarketing”—*i.e.*, they are not calls made “to induce the purchase of goods or services.”³ Thus, for consistency purposes, the Commission should adopt a similar position in its CAN-SPAM rulemaking efforts.

2. Section 316.2(o) – (d)

With regard to the question of whether a “commercial transaction” under section 7702(17)(A)(i) could exist even in the absence of an exchange of consideration, the answer is no. Messages that do not involve an exchange of consideration should instead be considered “transactional or relationship” messages. The CAN-SPAM Act excludes transactional or relationship messages from its definition of commercial emails. More specifically, transactional or relationship messages include e-mail messages whose primary purpose is “(ii) to provide warranty information, *product recall information*, or safety or security information with respect to a commercial product or service used or purchased by the recipient.”⁴ Thus, emails involving product recall information are an example of messages that don’t involve any exchange of consideration between the sender and the recipient.

2. Section 316.2(o) – (f)

The Commission also asks: under what circumstances should an e-mail message sent to effectuate or complete a negotiation should be considered a “transactional or relationship message? In these e-mails messages, solicitations or advertisements are not involved, since both parties have already commenced negotiations. Messages sent to complete a negotiation should be considered transactional, particularly since electronic correspondence has become such a common method of communicating and transacting business. In fact, email messages often become a permanent part of transaction files and records because of their significance in completing negotiations. Such email messages should be construed as non-commercial, since their primary purpose is to conduct negotiations that have already begun and are near completion, rather than to advertise or solicit a new sale.

2. Section 3.16.2(o) – (g)

In the proposed rule, the Commission asks whether messages sent from an employer to an employee at the employer-provided e-mail address should be considered transactional or relationship. The answer is affirmative. Periodic e-mail messages from one’s employer should be expected due to the employment relationship. If an employer sends its employees an e-mail about employee benefits, such as discounts on certain products and services, that message should fall under the transaction or relationship exception to commercial e-mails.

2. Section 3.16.2(o) – (j)

The Commission seeks additional comment on this question: where a recipient has entered into a

transaction with a sender that entitles the recipient to receive future newsletters or other electronically delivered content, should e-mail messages the primary purpose of which is to deliver products or services be deemed transactional or relationship messages? The answer is affirmative. Under the CAN-SPAM definition of transaction or relationship messages, if an association sends an e-mail to a member, the primary purpose of which is to deliver a product (such as a newsletter) that the recipient would expect to receive due to his/her membership with the association, that message would fall under the transactional or relationship-based category.

4. Section 3.16.4 – (a)

The Commission also seeks comment on its proposal to reduce the processing period for opt-out requests under the CAN-SPAM Act from 10 to 3 days. While NADA is committed to the Commissions' efforts to protect consumers from receiving unwanted commercial e-mail messages, reducing the processing period from 10 to 3 days would create a near impossible compliance burden for many of our members. It should not be assumed that small businesses routinely possess "instant removal of e-mail addresses submitted in opt-out requests,"⁵ nor should the Commission adopt a rule that effectively imposes such a requirement (and its corresponding costs) on small entities. Mandating such a limited processing period could potentially place many small businesses involuntarily out of compliance. In addition, larger associations that maintain different databases among departments and subsidiaries, need a sufficient amount of time to process opt-out requests that affect the entire association and various databases within the association. Thus, NADA strongly opposes the Commission's proposal to reduce the opt-out processing time period to 3 days.

NADA appreciates the opportunity to comment on this matter.

Sincerely,

Smitha Koppuzha
Staff Attorney

¹ 70 Fed. Reg. 25,431 (May 12, 2005)

² Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7702.2(A)

³ 68 Fed. Reg. 4580, 4664, n.1020 (January 29, 2003)

⁴ 15 U.S.C. §§ 7702.17(A)(2)

⁵ 70 Fed. Reg. 25,444